No. 86-603

Supreme Court, U.S.
FILED
FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

HELEN ABELS, *et al.*,

Petitioners,

v.

MONROE COUNTY EDUCATION ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

PETITIONERS' REPLY BRIEF

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I. THE OPPOSITION MISREPRESENTS THE ISSUES RAISED BY THE PETITION AND BY THE RECORD.

Initially, the respondent argues that the first question presented by the petitioners is based on a mischaracterization of the decision of the Indiana Court of Appeals and therefore it cannot provide the basis for review by this Court. However, it is the respondent that has mischaracterized the decision below.

Based upon the respondent's presentation the Indiana Court of Appeals affirmed a determination that the petitioners had to pay a fee equal to union dues less the

respondent's self-determined rebate. Specifically, the court said:

> Appellants proposed method of calculating the fair share representation fee results from a far too narrow reading of the test announced in *Ellis*. That test is useful only in determining what expenses are properly assessable against non-members. The appropriate formulation is the one suggested by earlier Supreme Court decisions and applied by the trial court below. That method defines a fair share representation fee as dues less a pro rata share of non-assessable expenses. (Citations omitted.)

App. 10a-11a. The first question presented asks whether the First Amendment permits this method of calculation or whether an agency fee must be based on a pro rata share of the proven costs of collective bargaining.

The record below clearly shows that a pro rata share is much less than the dues-less-rebate figure approved by the Indiana Court of Appeals. Thus, the First Amendment violation which is caused by the decision below is apparent.

The simple question—how do you calculate an agency fee—is fundamental, and the answer affects every agency fee payer in the country in both the public and the private sectors. The court below misinterpreted this Court's agency fee decisions in *Chicago Teachers Union v. Hudson*, 475 U.S. _____, 106 S. Ct. 1066 (1986), *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Railway Clerks v. Allen*, 373 U.S. 113 (1963), and *Machinists v. Street*, 367 U.S. 740 (1961), and reached the wrong answer. The need for further guidance from this Court in this sensi-

tive area impacting on First Amendment interests is clear. The petition should be granted in order to provide the lower courts with guidance that is obviously necessary.

II. THIS COURT IS NOT BEING ASKED TO REVIEW THE FACTUAL DETERMINATIONS OF THE COURT BELOW.

Respondent argues that the second question really involves a mere disagreement with the factual conclusions reached by the court below and that in raising it the petitioners disregard the record in the case. Apparently, the respondent does not perceive the issue.

Petitioners contend that before fees for affiliated organizations may be awarded, it must be shown that the expenses were incurred on behalf of petitioners' bargaining unit. The record below is clear that no proof was offered as to how much money either ISTA or NEA spent in providing services to the exclusive representative in this case. Petitioners argue, then, as a matter of law, that that failure is fatal to the claim for fees for the affiliated organizations. This Court has indicated that such proof is required. *Ellis*, 466 U.S. at 448, 453; *and see* petition at pp. 16-23. The absence of proof of the costs entailed in providing collective bargaining services to the unit to which the petitioners belong is fatal to the claim for fees for ISTA and NEA.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition the Court should grant the petition and set the case down for plenary briefing and argument.

Respectfully submitted,

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